

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DWIGHT ROGER GRAVES, JR.,

Plaintiff,

v.

DECISION AND ORDER
11-CV-01005

CORRECTIONAL MEDICAL SERVICE
and DR. DEASIS,

Defendants.

This case, wherein an incarcerated *pro se* plaintiff alleges violations of his Eighth Amendment rights based upon deliberate indifference to his medical needs, was referred to Magistrate Judge Jeremiah J. McCarthy pursuant to 28 U.S.C. §636(b)(1). Defendants filed a motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to exhaust administrative remedies. (Dkt. No. 6)

On February 27, 2013, Magistrate Judge McCarthy issued a Report and Recommendation recommending that the motion to dismiss be denied. (Dkt. No. 16) Magistrate Judge McCarthy found that plaintiff appeared to allege that his surgery interfered with his ability to file a grievance, and therefore the Magistrate Judge was unable to conclude, at this stage of the proceeding, that the complaint should be dismissed as a matter of law for failure to exhaust administrative remedies pursuant to the Prison Litigation Reform Act.

On March 15, 2013, defendants filed objections to Magistrate Judge McCarthy's Report and Recommendation. (Dkt. No. 18) This Court then issued an order directing plaintiff to file a response to defendants' objections on or before April 8, 2013 and directing defendants to file a reply, or a notice of no reply, on or before April 15, 2013. (Dkt. No. 19) Plaintiff has yet to submit a response to defendants' objections. Since ample time has now passed for plaintiff to respond, but has failed to do so, the Court deems the matter submitted.

Pursuant to 28 U.S.C. §636(b)(1), this Court must make a *de novo* determination of those portions of the Report and Recommendation to which objections have been made. Upon a *de novo* review, and after reviewing the defendants' objections, the Court hereby adopts Magistrate Judge McCarthy's recommendation to deny defendants' motion to dismiss the complaint based upon failure to exhaust administrative remedies, without prejudice to a later motion for summary judgment.

Accordingly, for the reasons set forth in Magistrate Judge McCarthy's Report and Recommendation, defendants' motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) is denied, without prejudice to defendants' ability to renew their defense of failure to exhaust administrative remedies in a motion for summary judgment. This matter is referred back to Magistrate Judge McCarthy for further proceedings.

SO ORDERED.

s/ Richard J. Arcara

HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

DATED: June 6, 2013